Comments Submitted By

U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION to

COUNCIL ON ENVIRONMENTAL QUALITY NEPA TASK FORCE

on

"Federal and Inter-governmental Collaboration"

in response to Federal Register / Vol. 67, No. 131 / Tuesday, July 9, 2002 / Notices

The U.S. Institute for Environmental Conflict Resolution (the U.S. Institute) submits the following comments in response to the Notice and Request for Comments published July 9, 2002, by the National Environmental Policy Act Task Force established by the Council on Environmental Quality.

The U.S. Institute is a federal program established by the U.S. Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The U.S. Institute is part of the Morris K. Udall Foundation, an independent federal agency of the executive branch overseen by a board of trustees appointed by the President. The U.S. Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties involved in such disputes, regardless of who initiates or pays for assistance. The U.S. Institute helps parties determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all the parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or to resolve the conflict. In addition, the U.S. Institute maintains a roster of qualified facilitators and mediators with substantial experience in environmental conflict resolution, and can help parties in selecting an appropriate neutral. (See www.ecr.gov for more information about the U.S. Institute.)

1. What are the characteristics of an effective joint-lead or cooperating agency relationship/process?

Based on the U.S. Institute's experience in helping to convene, design, and facilitate collaborative NEPA processes, the U.S. Institute has found that the essential elements of an effective joint-lead or cooperating agency relationship/process include:

COOPERATIVE ATTITUDES

Shared Understanding and Mutual Respect

Effective collaborating partners need to share an understanding and mutual respect for the other agencies involved, including how they operate, their cultural norms and values, their missions, their roles, their regulatory requirements, and their constraints. The mutual respect

must extend to the personal working relationships among the individuals who are representing their agencies in a collaborative process.

Trust

It is difficult to collaborate effectively when a high level of mistrust exists between agencies. In such situations, trust can develop only gradually – one step at a time. Collaborative approaches allow agencies to become more fully informed about the interests, needs, and constraints of the other agencies, as well as the rationale behind their positions. Trust is built on predictability, reliability, and consistency. Each time a mutual commitment is made and kept, an opportunity is created to build trust incrementally and improve relations. Each time a commitment is broken, trust diminishes, relations deteriorate, and skepticism increases.

SHARED MOTIVATION

Shared Vision with Clear Obtainable Goals and Objectives

Collaborating partners need to jointly develop a shared vision of the desired outcomes of their collective efforts and agree upon objectives and strategies to be pursued. The goals and objectives that they are working together to achieve should be clear to all partners and should be realistically obtainable.

• Participants See Collaboration as in Their Self-Interest

Effective partners need to see collaboration as in their own self-interest. They should enter into a collaborative relationship willingly to accomplish results they recognize they are more likely to achieve by working together than by working alone. They need to fully recognize and firmly believe that the benefits and advantages to be gained by working together outweigh the associated costs of collaborating, such as the time and resources required, as well as any loss of autonomy or potential threats to "turf."

Collaborating Partners Share A Stake in Both Process and Outcome

Collaborating partners must feel "ownership" of both the way they work together and the outcome of their efforts. Partners need to jointly design and agree on the processes and procedures they will follow. They also must see that the eventual outcome is likely to meet at least some of their important needs and interests.

PARTICIPATION

Appropriate Representation of Affected Interests

The perceived legitimacy of collaborative processes depends on whether they are seen by other stakeholders and the public at large as representative of all affected interests and points of view. A fundamental principle of collaborative problem-solving efforts, therefore, is that all interests with a stake in the decisions should be represented in the process. This ensures that agreements reached will be perceived as legitimate by all relevant parties and will have broad support when implemented.

Multiple Layers of Decision-Makers Are Engaged

For collaborative efforts to be successful, it is usually necessary that every level within each partnering agency (senior management, program management, project management, operations, scientific and technical staff, administrative staff) participate in working collaboratively with their counterparts in other agencies. Without a full commitment to and accountability for collaboration across an agency, staff in different departments and at different levels within the agency can create numerous obstacles and roadblocks to success.

Open and Frequent Communication

Collaborative partners need to interact often, update each other regularly, discuss issues and differences openly, and convey all necessary information to one another as well as to others interested in the outcome of the collaboration process. Communication protocols for the collaborative effort should be negotiated and documented to provide ongoing guidance and accountability throughout the process.

Continuity of Participants

Successful collaboration depends on the continuing involvement of a core group of participants, due to both the required investment in learning on the part of each participant and the development of relationships among all the participants throughout the collaborative process. Furthermore, the motivation and incentives for engaging productively in interagency collaborative efforts are increased when partners anticipate the need for continued cooperation into the future to fully implement a decision designed to accomplish their shared objectives. Establishing mutual expectations to jointly monitor the impacts of a decision and to consult with each other regarding the need to modify management actions enhances the level of commitment to collaborative processes. Agencies see they have a shared stake in the successful implementation of their collaborative decision-making process.

SHARED PROCESS EXPECTATIONS

Development of Defined Roles, Responsibilities, and Authorities

To be successful, collaborating NEPA partners need to negotiate and achieve a mutual understanding of their respective roles, responsibilities, and authorities regarding their joint effort. The roles of the lead, co-lead, and cooperating agencies and their responsibilities should be clearly articulated and communicated to staff throughout the agency.

Mutually Negotiated Procedural Expectations

Effective collaborating partners negotiate ground rules to clarify and document their mutual expectations and agreements regarding a variety of procedural and process issues about which they may have concerns. Detailed explicit ground rules are particularly important when the level of trust between collaborating parties is low.

• Appropriate Use of Third-Party Neutral Assistance

Partners in effective interagency collaborations understand when and how to effectively utilize the services of third-party neutrals to assist them in conducting assessments, convening participants, designing appropriate processes, facilitating productive communication, and resolving conflicts. Regardless of how the costs are shared to provide

the third-party neutral services, all the cooperating agencies should expect impartial assistance from the neutral.

RESOURCES

Adequate Resources and Capabilities

To be effective, collaborating NEPA partners need to have the necessary resources and staff capabilities to engage in the type of intensive negotiations often required to develop the procedural and substantive agreements associated with a joint interagency effort. Additional funding may be required for travel to meetings and, depending on the level of conflict or controversy, for the services of a neutral facilitator. Participating staff need to have the appropriate negotiation and collaboration skills both to effectively articulate the needs and interests of their agency and to work successfully with others in identifying opportunities for mutual gains.

2. What barriers or challenges preclude or hinder the ability to enter into effective collaborative agreements that establish joint-lead or cooperating agency status?

The following are some of the key barriers and challenges that preclude or hinder the ability to enter into collaborative agreements establishing joint-lead or cooperating agency status:

MISPERCEPTION OF COLLABORATION AND COLLABORATIVE AGREEMENTS

 Agencies tend to equate collaboration with relinquishing control over decision-making process.

Agencies are often reluctant to pursue interagency or intergovernmental collaboration because they equate it with relinquishing their control over a decision. Agencies may perceive this stance to be appropriate based on their conviction that they cannot legally entrust their decision-making authority and accountability to others. Agencies frequently do not understand that a collaborative process can, in fact, help ensure that their key needs and requirements are satisfactorily addressed before an option under collective consideration can become a truly viable decision.

• Failure to recognize when it is necessary to accommodate the needs and interests of others in order to accomplish an agency's own mission.

Agencies frequently fail to recognize that, in order to achieve important objectives related to their mission, they must be willing to try to accommodate the needs and interests of other agencies and stakeholders with an influential role in the successful implementation of a project. Agencies often fail to explore opportunities for mutual gains with other agencies or stakeholders.

• Poor understanding of how to determine whether it is appropriate to pursue collaboration in a given situation.

Interagency or intergovernmental collaboration is not necessarily an appropriate approach to pursue in every situation or at a given time in an otherwise appropriate situation. Agencies need to learn how to better assess the prospects for successful collaboration and how to positively alter those prospects before convening a collaborative effort with other partners. Agencies also need to be able to evaluate their own internal readiness and staff capability to productively engage in a collaborative effort.

PERCEIVED PROCEDURAL BARRIERS

- FOIA and "Sunshine Law" concerns about confidential interagency or intergovernmental negotiations of difficult procedural and substantive issues.

 Frank and open discussions are often required to negotiate the resolution of challenging procedural and substantive differences among collaborating partners. Parties may need assurances of confidentiality for these conversations to be willing to openly explore potential ideas and solutions. Although the Alternative Dispute Resolution Act of 1996 (ADRA) establishes provisions for the confidentiality of communications between parties and a neutral in a dispute resolution process occurring in an administrative context, federal agencies frequently have concerns about litigation adversaries obtaining information through the Freedom of Information Act. (ADRA provides an exemption from FOIA for certain communications made in a dispute resolution proceeding, but this exemption is not widely understood at many agencies.) An additional challenge for confidentiality is that some state "Sunshine Laws" potentially make virtually all communications involving state agency staff available to the public. (See Attachment A for guidance on confidentiality issues developed by the U.S. Institute for use by its in-house or contracted neutrals.)
- Inconsistent understanding of FACA requirements.

 Many agencies are interested in considering how to pursue more collaborative approaches to the NEPA processes. This might involve extending cooperating agency status to other governmental partners, as well as enhancing opportunities for stakeholder participation. However, there is widespread confusion and inconsistent understanding both within and among federal agencies regarding the Federal Advisory Committee Act (FACA) requirements in obtaining advice and recommendations from stakeholders. Agencies generally tend to be very risk averse regarding potential FACA violations. Few agencies are familiar with allowable exceptions to FACA, such as an advisory body convened and managed by an independent neutral institution.
- Poor internal agency understanding of the flexibility available within regulatory
 constraints and what issues may or may not be negotiable.
 Frequently, agencies disagree internally regarding the areas and degree of regulatory
 flexibility they have in pursuing collaborative negotiated solutions. This can result in agency
 staff working at cross-purposes, as well as confusion for collaborating partners.

Overemphasis on NEPA documentation and litigation protection.

Agencies tend to view NEPA for the most part as a set of procedural requirements with which they must comply in order to avoid litigation. Unfortunately, this primary focus on documentation and litigation protection overwhelms the likelihood that agencies will see the opportunity to use NEPA as an effective framework for collaborative planning and decision-making.

 Inadequate understanding of the responsibilities and requirements associated with collaboration.

Successful collaboration requires considerable "care and feeding" and the ability of initiating agencies to understand and anticipate the needs and concerns of other participants in a collaborative effort. Many agencies are not aware of, or prepared for, the responsibilities and commitments required of the sponsor of a successful collaborative process.

LIMITED SKILLS AND PROCESS KNOWLEDGE

• Inadequate experience in how to negotiate effectively for mutual gains.

While many agencies may have staff that are effective advocates for their mission, far fewer staff have effective negotiation skills for discovering mutual gains. Yet finding opportunities where all participants can benefit is often a prerequisite for achieving implementable solutions.

 Reluctance by lead agencies to engage in joint fact-finding to develop mutually acceptable protocols for collection of scientific data, modeling of alternatives, and analysis of impacts.

Contested scientific information and analysis is frequently an obstacle to collaborative problem solving. Agencies may not want to acknowledge the legitimacy or relevancy of information generated by others, especially if they perceive that they have competing interests. Establishing protocols for joint fact-finding at the outset of a collaborative NEPA process could enable more efficient and more robust analysis of agreed upon facts and methodologies.

 Few available successful examples to serve as models for interagency and intergovernmental collaboration on NEPA.

For those progressive innovators within agencies who wish to explore the use of more collaborative approaches to NEPA, there are few documented successful examples that can serve as process models. Another obstacle is that, for agencies to recognize the relevance and applicability of case examples, they often need to have customized examples that explicitly incorporate their own specific mission requirements and regulatory constraints.

 Under-use of and lack of access to credible conveners and neutral facilitators for interagency negotiations.

In high conflict situations, agencies often may require a credible convener to bring them together to work on a mutual solution. Neutral independent facilitators may also be needed to help agencies negotiate the difficult issues associated with complex collaborative decision-making. Some agencies may not be aware of how to efficiently access these services. In

addition, agencies may be reluctant to take advantage of neutral assistance because they equate this assistance with relinquishing control over a decision-making process or perceive it as a failure to solve their own interagency challenges.

NEEDED LEADERSHIP AND INSTITUTIONAL SUPPORT

 Inadequate support and commitment from agency officials for pursuing collaboratively derived solutions.

Collaborative efforts are often initiated without adequate support and commitment from higher-level agency officials. This may mean that the required resources may not be made available. It may also mean that a negotiated solution cannot be implemented because officials were not supportive of the collaborative approach that was used or because they are unwilling to go along with the solution that was negotiated. Failure to follow through on perceived commitments erodes trust and confidence in pursuing collaborative efforts.

• Inadequate organizational incentives rewarding collaboration and deterring reliance on adversarial unilateral approaches.

For collaborative NEPA approaches to thrive within agencies, appropriate organizational incentives need to be established that reward successful attempts at interagency collaboration and deter reliance on adversarial unilateral approaches, which often result in lawsuits and/or prolonged delays in implementation.

3. What specific areas should be emphasized during training to facilitate joint-lead and cooperating agency status?

Some of the key areas that should be emphasized in training for collaborative NEPA processes are:

- Collaboration and negotiation skills for staff engaged in interagency efforts
- Interagency team leadership and project management skills
- Mutual education by collaborating partners regarding their respective agency missions, statutory requirements, and important project-specific constraints
- Situation assessment and diagnostic skills to determine if collaboration is possible and appropriate
- Using NEPA as a framework for collaborative planning
- Providing MOU templates for collaborative NEPA processes
- Agency-specific case study examples of successful collaborative NEPA processes

- FOIA and FACA in the context of interagency collaboration, interagency conflict resolution, and enhanced stakeholder participation in NEPA processes
- How to access and effectively use third-party neutral assistance.
- Organizational change to accommodate collaborative problem-solving and shared decision-making, as well to encourage and reward participation in collaborative processes.

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Confidentiality Checklist for Neutrals U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION

Introduction

Confidentiality is often a major issue at the outset of an environmental conflict resolution (ECR) process. While confidentiality is an important issue, it may be over-emphasized by the parties because of other concerns (for example, lack of trust or fearfulness about the process).

This checklist identifies factors related to confidentiality that should be considered at the beginning of an ECR process. The attachment discusses many of the bullet points in more depth.

1. The neutral and stakeholders need to consider confidentiality and related policy and process issues early in the ECR process.

- Principle of openness (particularly for public policy processes) needs to be considered, along with protection of participants' interests.
- Is confidentiality really the issue, or is it one of trust, fearfulness, value differences, etc.?
- Does everyone have the same understanding of the meaning of "confidentiality"? For example, will there be no disclosure of information, or merely no attribution? Will sessions be closed, partly open, completely open, etc.?
- Is it feasible to offer confidentiality? Are there too many participants or is there too much public interest in the issues to maintain confidentiality?
- Can everyone agree on ground rules regarding the level of confidentiality and implementation?
- Confidentiality needs to be a continuing agenda topic during the process.
- How will the stakeholders/neutral deal with the press?
- What is the relationship between the neutral and the court or agency under or through which the ECR process is undertaken?

2. Legal context

- Do federal or state laws require an open process? Stakeholders should consult their lawyers regarding: state open meeting laws, federal sunshine laws, Federal Advisory Committee Act.
- Do federal or state laws either require or protect confidentiality? Check the Administrative Dispute Resolution Act, state mediation confidentiality acts.
- Will the Freedom of Information Act require disclosure of documents in the hands of federal
 agencies, or does the exemption from FOIA contained in the Administration Dispute Resolution
 Act apply? How will the neutral and stakeholders keep track of which records are exempt from
 disclosure?
- To what extent and against whom would a confidentiality agreement among the parties be enforceable?
- Do ethical or agency guidelines affect the ability of legal counsel to publicly discuss matters that
 might be evidence in pending litigation or make statements in the press that could affect a later
 court proceeding?
- If the process is related to litigation, is there or should there be a court order regarding confidentiality?

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ADDITIONAL BACKGROUND FOR CONFIDENTIALITY CHECKLIST

The neutral and stakeholders need to discuss confidentiality and related policy and process issues early in the ECR process.

- Principle of openness (particularly for public policy processes) needs to be considered, along with protection of participants' interests: The U.S. Institute's position is that ECR processes generally should be open and transparent, with exceptions being made as necessary but not automatically. In some circumstances, a blend of private and public sessions may be beneficial to allow for more candor by participants in the closed sessions while ensuring that the public is fully informed of important issues.
- Is confidentiality really the issue, or is it one of trust, fearfulness, value differences, etc.?
 - o Issues of confidentiality often relate to the level of trust among the parties.
 - o Confidentiality should be given proper weight and not over-emphasized; the potential risk of disclosure is often overestimated.
 - This issue should not be artificially separated from other important preliminary matters; instead, guidelines about roles, communication and safety in the process need to be interwoven with confidentiality.
- Does everyone have the same understanding of the meaning of "confidentiality"?

 An important first step for the neutral is to find out not only whether confidentiality is important to the stakeholders, but why it is important, and what each stakeholder means by confidentiality. For example, a party may think that confidentiality means:
 - o There will be no disclosure of any information outside of the sessions; all information will be kept confidential by the neutral and the parties; or
 - Statements made to the neutral will not be disclosed to other parties in the ECR process;
 or
 - The views of various interests will become known outside of the process, but these views will not be attributed to individuals or groups; or
 - There will be controlled, limited disclosures regarding the negotiations, by way of public statements or press releases issued periodically by the group or agreed-upon spokespersons, or
 - o While there will not be strict confidentiality, the information exchanged may not be used as evidence in related or subsequent administrative proceedings or litigation.
- Is it feasible to offer confidentiality? Are there too many participants or is there too much public interest in the issues to maintain confidentiality? In a process involving many stakeholders, or representatives from large stakeholder groups, it may not be feasible to maintain confidentiality of communications between the participants. Or there may be so much public interest in the issues that it may not be acceptable for all of the process to be closed. These issues need to be addressed when ground rules are set.

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- Can everyone agree on ground rules regarding the level of confidentiality and implementation? Ground rules need to be established to cover issues related to confidentiality, and it is essential that all the participants are in agreement on those ground rules. Issues covered should include: the closed or open nature of the process; disclosure and/or use of information from caucuses; whether and how much information will be shared publicly; and how much information representative stakeholders may share with those they represent. Often, the solution to confidentiality issues lies in communication and the process used, rather than in legal authorities.
- Confidentiality needs to be a continuing agenda topic during the process. As a process proceeds
 and information is exchanged, a party's confidentiality concerns may change from those held at
 the beginning of the ECR process. The neutral should periodically check with participants to
 ensure that existing understandings about confidentiality are adequate.
- How will the stakeholders/neutral deal with the press? The press can be an ally in the effort to educate the public and interested parties about a process, and it may be helpful to consider that possibility at the beginning of a process. In some instances, members of the press might participate in a discussion about their role in the process. In some processes, reporters have agreed to non-attribution of statements during a process or to relying on interviews after a session for their stories. Even if a process will not be open to the public and press, the neutral and stakeholders should consider use of joint press briefings at some points in the process. Neutrals should also be prepared to answer press questions regarding the legal basis for confidential communications and to discuss the competing values surrounding confidentiality.
- What is the relationship between the neutral and the court or agency under or through which the ADR process is undertaken? Do all participants have a clear understanding about what information will be provided by either the participants or the neutral to the court or agency through which the process is undertaken? The parties can discuss what the neutral will and will not communicate, as well as use of communications or documents from the ADR process in any later proceeding.

Legal context

- Do federal or state laws require an open process? Stakeholders should consult their lawyers regarding: state open meeting laws, federal sunshine laws, Federal Advisory Committee Act.
 - o Many states have open meeting laws, which generally require an open meeting whenever the quorum of a governing body is present. Under such laws, a conflict resolution process may not be conducted in private if it is attended by enough members of a board of county commissioners or city council to constitute a quorum. It should be the role of a governmental stakeholder and its legal counsel to determine when these rules apply.
 - A federal agency that is governed by a collegial body whose members are appointed by the President may be subject to similar restrictions under the federal Sunshine Act, 5 U.S.C. 552(b).
 - o The Federal Advisory Committee Act is summarized on Attachment 1. If a group established to give a federal agency advice is controlled by the agency, the committee

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may be subject to FACA, which requires that meetings be noticed and held in the open. The agency's counsel should provide legal advice as to the applicability of FACA.

- Do federal or state laws either require or protect confidentiality? Check the Administrative Dispute Resolution Act, state mediation confidentiality acts.
 - o Is this process protected by the Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. § 574? If the conflict resolution process utilizes a neutral and relates to a disagreement over a federal agency decision, ADRA is likely to apply. Guidance from the Federal ADR Council can be found in the Federal Register, 65 Federal Register 83085 (December 29, 2000). It should be available online at: http://www.access.gpo.gov/nara/index.html.
 - Many states have existing mediation confidentiality or privilege laws with varying application. The participants (particularly if state or local governments are involved) may have legal counsel to advise them regarding what state confidentiality laws may be applicable.
- Will the Freedom of Information Act require disclosure of documents in the hands of federal agencies, or does the exemption from FOIA contained in ADRA apply? How will the neutral and stakeholders keep track of which records are exempt from disclosure?
 - o ADRA provides an exemption from disclosure under the Freedom of Information Act for specified communications between the neutral and the parties that are protected as confidential by the Act. The FOIA exemption is found at 5 U.S.C. §574(j). It is important for the governmental parties to a process to be made aware of this exemption, and it may be good practice to refer to the exemption in ground rules, contracts, etc., so that parties are aware that it exists.
 - o If a process is confidential, some procedures should be established to identify and label documents that are confidential and exempt from FOIA.
- To what extent would a confidentiality agreement among the parties be enforceable?
 - O Under ADRA, the parties may agree to any level of confidentiality they choose. They may not, however, agree to expand the application of the FOIA exemption.
 - While confidentiality agreements are generally enforceable between parties in a private mediation, FOIA and various state "open records" laws may limit the effectiveness of confidentiality agreements involving public entities.
 - Participants should recognize that their confidentiality agreement may have little or no effect on third parties who are not signatories and who may later seek information generated in the ADR process.
- Do ethical or agency guidelines affect the ability of legal counsel to publicly discuss matters that
 might be evidence in pending litigation or make statements in the press that could affect a later
 court proceeding? Consider how the Rules of Professional Conduct regarding trial publicity or
 agency guidelines about public statements could affect the process design in terms of
 confidentiality.

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- If the process is related to litigation, is there or should there be a court order regarding confidentiality?
 - O It is the position of the Justice Department that ADRA's confidentiality protections apply only to administrative proceedings and actions, and not to conflict resolution processes related to litigation. The neutral and parties should consider whether they would like court-ordered confidentiality, or whether court rules apply to protect confidences. Once the parties are in agreement, they may stipulate to, or file a motion for, confidentiality protection through their attorneys.
 - Rule 408 of the Rules of Evidence provides generally that neither statements and conduct in settlement negotiations nor settlement offers may be used as proof of the existence or amount of a claim in a court proceeding. Participants should recognize that this may be a valuable protection for communications made in the ECR process, but that the protection is not absolute. A court's ultimate decision as to admissibility of such information will likely involve an assessment of the purposes for admitting the evidence and potentially a "balancing test" between the competing values of protecting settlement communications and the admission into evidence of important and relevant evidence.

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• Comments						
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Re:	Comments		Date:	9/23/2002		
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